STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FTI/166676

The attached proposed decision of the hearing examiner dated September 8, 2015, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed June 16, 2015, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Public Assistance Collection Unit in regard to FoodShare benefits (FS), a hearing was held on August 13, 2015, at Milwaukee, Wisconsin.

NOTE: The record was held open until August 14, 2015, to allow the parties to supplement the record. The Petitioner's wife called and indicated that they would have some difficulties getting a statement from Petitioner's mother, because she went into the hospital for a short time. The record was then held open until August 21, 2015.

The Parties submitted the following documents:

Exhibit 27 -	A lease dated August 10, 2013
Exhibit 28 -	Petitioner's comments concerning a portion of the FoodShare Manual
Exhibit 29 -	A fax containing a letter from [redacted] comments on an application page and additional comments regarding the FoodShare Manual.
Exhibit 30 -	OIG's Response to Petitioner's submissions with a copy of a decision in case IPV-162609
Exhibit 31 -	An ACCESS application dated June 25, 2013, submitted by OIG
Exhibit 32 -	An ACCESS application dated July 24, 2012, submitted by OIG
Exhibit 33 -	An ACCESS SMRF dated December 26, 2012, submitted by OIG
Exhibit 34 -	An ACCESS application dated February 22, 2012, submitted by OIG

At the hearing, the Petitioner gave ALJ Ishii permission to look at a decision issued in his wife's case. A copy of that decision, for case FTI-167024 has been marked as Exhibit 35 and entered into the record. The formal citation for Exhibit 35 is: Decision DHA Case No. FTI-167024 (Wis. Div. Hearings & Appeals July 27, 2015) (DHS). The decision in case FTI-167024, concerning the Tax Intercept appeal of Petitioner's intermittently estranged wife, RC, did not address the issues of whether her appeal of the underlying overpayment was timely, nor whether she was liable for the overpayment, while the case at hand, does address whether the Petitioner's appeal of the underlying overpayment is timely and whether he is a liable party.

At the hearing, the Petitioner also indicated that public records concerning his daughter's eviction should be reviewed. These have been cited using the Wisconsin Circuit Court Access website.

The issues for determination are:

1) Whether Petitioner's appeal of an underlying overpayment claim is timely;
2) If so, whether the Office of Inspector General (OIG) correctly determined the Petitioner is liable for an overpayment of benefits to his adult daughter, AM.
3) Whether the Petitioner's appeal of a tax intercept is timely, and
4) If so, whether OIG correctly implemented the tax intercept.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: [redacted]
Public Assistance Collection Unit
PO Box 8938
Madison, WI 53708-8938

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.

2. In 1993, Petitioner signed a lease for a home located at [redacted] Also listed on the lease was his daughter AM, who was a minor at the time. (Exhibit 27)

3. The record reflects that Petitioner and his wife, RC, separated in 2003 due to Petitioner's infidelity. Petitioner moved away from the [redacted] address. He initially lived with his various mistresses but eventually moved in with his mother at an address on [redacted] (Testimony of Petitioner; Testimony of RC; Exhibit 29)

4. Petitioner and RC reconciled and Petitioner returned to the [redacted] address in August 2014. However, during all times relevant, Petitioner used the [redacted] address as his mailing address. (Testimony of Petitioner; Testimony of RC)

5. On February 22, 2012, AM, who was then 33 years old, completed an on-line ACCESS application indicating that she was homeless, but living at [redacted] in care of Petitioner's wife, RC. AM reported being in a household with IC age 12, and her younger brother DC, age 7. Petitioner and his wife, RC, were listed as absent parents for DC. AM electronically signed the application, certifying, "under penalty of perjury and false swearing that my answers are correct and complete to the best of my knowledge." (Exhibit 34)

6. On July 24, 2012, AM completed an on-line ACCESS renewal, indicating that she was homeless, but living at [redacted] At that time, AM added another relative, NP, age 16 to her home and again reported living with IC and DC. Petitioner was listed as an absent parent for NP, but not DC. RC was not listed as an absent parent, at all. AM electronically signed the application, certifying, "under penalty of perjury and false swearing that my answers are correct and complete to the best of my knowledge." (Exhibit 32)

7. On December 26, 2012, AM completed an on-line Six Month Report Form (SMRF), indicating that she lived at [redacted] In this form, AM reported living with NP age 17, IC age 13 and DC age 8. AM electronically signed the SMRF, certifying, "under penalty of perjury and false swearing that my answers are correct and complete to the best of my knowledge." (Exhibit 33)

8. On June 25, 2013, Petitioner's daughter, AM, completed an on-line ACCESS application, indicating that she lived at [redacted] with NP, IC, and her 8 year-old brother DC. AM electronically signed the application certifying, "under penalty of perjury and false swearing that my answers are correct and complete to the best of my knowledge." (Exhibit 31)

9. On January 22, 2014, the Office of Inspector General (OIG) sent AM five overpayment notices:

   Claim [redacted] for $680.00, for the period of February 22, 2012 to July 31, 2012.

   Claim [redacted] for $2303.00 for the period of August 1, 2012 through January 31, 2013.

   Claim [redacted] for $1968.00 for the period of February 1, 2013 through July 31, 2013.

   Claim [redacted] for $1054.00 for the period of August 1, 2013 through October 31, 2013.

   Claim [redacted] for $155.00 for the period of December 2, 2013 through December 31, 2013.

   The Petitioner was NOT listed as an addressee on these notices. The only addressee on these notices was AM. However, the Petitioner's name was listed, along with AM and RC, as a case name on the overpayment worksheets that were attached to the back of the overpayment notices.

   (Exhibits 15, 16, 17, 18 and 19)

10. Also on January 22, 2014, OIG sent the Petitioner a one paragraph "free form" letter, at [redacted] The letter indicated that the Petitioner was liable for the overpayment caused by AM's actions and that he was liable, because he was considered part of AM's household. The letter did not advise the Petitioner of his appeal rights, nor did it refer him to any attachments. (Exhibit 14)

11. OIG attached to the January 22nd "free form" letter, copies of AM's five overpayment notices, which are described in Finding of Fact #9. (Exhibit 3)

12. On February 4, 2014, OIG sent the Petitioner a repayment agreement at the [redacted] address. (Exhibit 20)

13. On March 4, 2014, April 2, 2014, and May 2, 2014, OIG sent the Petitioner dunning notices to remind him about the overpayment. These were all sent to the Petitioner at [redacted] (Exhibit 21)

14. On June 13, 2014, the Public Assistance Collections unit sent the Petitioner a notice of tax intercept, advising him that it would be intercepting his taxes to satisfy the overpayment. This notice was sent to the Petitioner at the [redacted] (Exhibit 22)

15. In 2014, the Petitioner was, at minimum, using the [redacted] address as a mailing address. (Testimony of Petitioner and RC)

16. On January 27, 2015, the Division of Hearings and Appeals conducted an Administrative Disqualification Hearing in case FOF-162609, because OIG sought to disqualify AM from participation in the FoodShare program for an Intentional Program Violation. AM did not appear at the hearing. (Exhibit 30)

17. On February 23, 2015, the Administrative Law Judge issued a decision in case FOF-162609, finding that AM committed an intentional program violation by falsely reporting NP in her household in a June 2013 on-line renewal and because she falsely claimed an $850 per month rent expense. (Exhibit 30, decision page 3)

18. The February 23, 2015 decision also indicated in the Findings of Fact, that AM "falsely reported household membership by failing to report that her parents lived in her home." However, this was not mentioned in the Discussion section of the decision. (Exhibit 30- decision pages 2 and 3)

19. In April 2015, the Petitioner received a letter from the Department of Revenue, advising him that it was withholding $683.00 to satisfy a debt to another government agency. (Testimony of Petitioner)

20. The Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on June 16, 2015. (Exhibit 1)

21. On July 2, 2015, Petitioner's wife, RC, filed an appeal of a tax intercept with the Division of Hearings and Appeals. This was case FTI-167024. (Exhibit 35)

22. On July 27, 2015, an Administrative Law Judge (ALJ) issued a decision in case FTI-167024, finding that RC's appeal of the tax intercept was untimely, so the agency could proceed with the tax intercept. (Exhibit 35)

23. The recoveries/recoupments made toward the underlying overpayment are as follows:

From Petitioner:

$678.00 via tax intercept on April 21, 2015

From RC, all via tax intercept:

$1203.00 on May 8, 2015

$1968.00 on May 8, 2015

$264.00 on May 19, 2015

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$155.00 on April 21, 2015

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From AM, via recoupment from her current benefits between August 2014 and May 2015:

August 2014 - $33.00

September 2014 - $34.00

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(Exhibit 25 – Claim Payment History printed June 23, 2015)

DISCUSSION

OIG's Theory of the Case

The State is required to recover all FoodShare overpayments. An overpayment occurs when a FoodShare household receives more FoodShare than it is entitled to receive. *7 C.F.R. §273.18(a)(3).* The Federal FoodShare regulations provide that the agency shall establish a claim against a FoodShare household that was overpaid, even if the overpayment was caused by agency error. *7 C.F.R. §273.18(a)(4)(b).*

Further, "all adult or emancipated minors that were included in the household or should have been included in the household at the time of the overpayment occurred are liable for repayment of the overissuance of FS." *FSH §7.3.1.2; see also* 7 CFR §273.18(a)(4)(i)

Biological, adoptive, or step-parents and their children under the age of 22, and "adults and minor children (sic) under the age of 18 years (sic) over whom they are exercising control" must be included in the same food unit. *FSH §3.3.1.3; See also C.F.R. §273.1(b)(1)*

A food unit consists of, "one or more persons who live in the same household and purchase and prepare food together for home consumption. This group is tested for eligibility together…" *FSH §3.3.1.1* (Federal Regulations use and define the term "household" in 7 CFR §273.1(a) with the same meaning given to the term "food unit" in the FSH).

According to OIG, Petitioner, his 33 year-old daughter, AM, and his minor child, DC, all lived together at the [redacted] address. AM applied for FoodShare benefits and reported DC, as part of her food unit/household. Petitioner is DC's father, so OIG contends that per *FSH §3.3.1.3*, the Petitioner should have been included in the food unit / household. Therefore, OIG contends that the Petitioner is liable for the FoodShare overpayment incurred by AM, pursuant to *FSH §7.3.1.2.*

Is Petitioner's Appeal of the Overpayment Untimely?

The Petitioner argues that his appeal of the underlying overpayment should be considered timely because he was not given adequate notice of the overpayment. OIG contends that Petitioner is precluded from further litigating the issue of the timeliness of his appeal of the underlying overpayment, because RC's appeal in case FTI- 167024 was deemed to be untimely.

I decline to review the effect that FTI-167024 should have on this matter because I find on the merits of this case that Petitioner's appeal of the overpayment is untimely.

The federal SNAP regulations require that notices be provided to the household. 7 CFR § 273.18(e)(3)(i) states that "each State agency must develop and mail or otherwise deliver to the *household* written notification to begin collection action on any claim." (Emphasis added) The household is the food unit. AM was the case head for the household. The law does not require that each adult member of the household be given a separate notice. No one disputes that AM was given adequate notice of the overpayment on January 22, 2014. I conclude, then, that any request for a fair hearing made by a member of that household had to be made within 90 days of that notice. 7 CFR § 273.15(g)

Although this specific finding is not necessary given my conclusion above, I do find that Petitioner had adequate notice of the overpayment action. On the same day that AM was given proper notice, including notification of the household's appeal rights, copies of those notices were sent to Petitioner accompanied by the following clear statement of his liability:

> [AM] did not report accurate household members living in the home during this time. Because [DC] was listed on the case and because other members of the home are recorded using [AM]'s Quest card, these individuals, including [RC] and [Petitioner], are required to be on the case. This means that their income would have been counted for the determination of Foodstamps (sic). Adding their income would have put the group over the income limit for Foodstamps (sic) for the period of 3/33/12 through 12/31/13. [AM], [RC], [VC] are all liable parties to the Foodstamp (sic) overpayment for the months of February 2012 through December 2013.
>
> (Exhibit 14)

In addition, on February 4, 2014 Petitioner was sent a repayment agreement that referred to "the overpayment of benefits which you are responsible to repay." (Exhibit 20) Dunning notices with similar statements were sent on March 4, 2014 and April 2, 2014 (Exhibit 21). All of these documents were sent within 90 days of the January 22, 2014. At all of these points had Petitioner filed a request for hearing on the overpayment actions it would have been timely.

Because I find that Petitioner's appeal of the overpayment is untimely I will not address his argument that OIG incorrectly determined he was liable for the overpayment of benefits to AM.

Is Petitioner's Appeal of the Tax Intercept Untimely?

Wis. Stat., §49.85, provides that the department shall, at least annually, certify to the Department of Revenue, the amounts that it has determined that it may recover resulting from an overpayment of general relief benefits, overissuance of FoodShare benefits, overpayment of AFDC, and Medical Assistance payments made incorrectly.

The Department of Health Services must notify the person that it intends to certify the overpayment to the Department of Revenue for setoff from his/her state income tax refund and must inform the person that he/she may appeal the decision by requesting a hearing. Id. at §49.85(3).

The hearing right is described in Wis. Stat., §49.85(4)(b), as follows:

> If a person has requested a hearing under this subsection, the department … shall hold a contested case hearing under s. 227.44, except that the department … may limit the scope of the hearing to exclude issues that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing.

A party has 30-days from the date of the letter/notice of tax intercept to file an appeal. Wis. Stat., §49.85(3)(a)2; FSH §7.3.2.11

The Public Assistance Collections Unit (PACU) sent the June 13, 2014 notice of tax intercept to the Petitioner at the [redacted] address. The Petitioner claims that he never received the notice, because he stopped living at the [redacted] address, after he and RC informally separated. However, the Petitioner testified that even though he and RC had become estranged and he stopped living at the [redacted] address, that he continued to use the [redacted] address as his mailing address.

Wis. Stats. §891.46 creates a presumption that service has occurred upon mailing, stating that, "summonses, citations, notices, motions and other papers required or authorized to be served by mail in

judicial or administrative proceedings are presumed to be served when deposited in the U.S. mail with properly affixed evidence of prepaid postage." Further, "the mailing of a letter creates a presumption that the letter was delivered and received." State ex. rel Flores, 183 Wis.2d 587 at 612, 516 N.W.2d 362 (1994). Thus, the party challenging the presumption bears the burden of presenting credible evidence of non-receipt. Id at 613.

Given that PACU sent the tax intercept notice to the Petitioner at his correct mailing address, it is reasonable to conclude that Petitioner received the notice. There is no credible reason presented, why Petitioner would not have received the notice. Indeed, both Petitioner and RC testified that they were on good terms at the time and in fact, moved back in together in August 2014.

Petitioner did not file his appeal of the tax intercept until June 16, 2015, well past the 30-day deadline for filing an appeal of the tax intercept. As such, his appeal of the tax intercept is untimely and no jurisdiction exists to hear the merits of that appeal.

CONCLUSIONS OF LAW

1. Petitioner's appeal of the underlying overpayment is untimely.
2. Petitioner's appeal of the tax intercept is untimely.
3. Because that appeal is untimely, Hearings and Appeals does not have jurisdiction to review the merits of Petitioner's appeal of the tax intercept.

THEREFORE, it is **ORDERED**

That, this appeal is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this

decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison, Wisconsin, this 26 day of October, 2015.

Thomas J. Engels, Deputy Secretary
Department of Health Services

FH
8107486285

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

PROPOSED DECISION

FTI/166676

PRELIMINARY RECITALS

Pursuant to a petition filed June 16, 2015, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Public Assistance Collection Unit in regard to FoodShare benefits (FS), a hearing was held on August 13, 2015, at Milwaukee, Wisconsin.

The Division of Hearings and Appeals has determined that this decision should be issued as proposed because the fact pattern is novel and because the decision in case FTI-167024, concerning the Tax Intercept appeal of Petitioner's intermittently estranged wife, RC, did not address the issues of whether her appeal of the underlying overpayment was timely, nor whether she was liable for the overpayment, while the case at hand, does address whether the Petitioner's appeal of the underlying overpayment is timely and whether he is a liable party.

As will be discussed further below, both this decision and the decision in case FTI-167024 found the appeal of the tax intercept to be untimely, though the decisions were based on two, separate records that were similar, but not identical.

NOTE: The record was held open until August 14, 2015, to allow the parties to supplement the record. The Petitioner's wife called and indicated that they would have some difficulties getting a statement from Petitioner's mother, because she went into the hospital for a short time. The record was then held open until August 21, 2015.

The Parties submitted the following documents:

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the record. The formal citation for Exhibit 35 is: Decision DHA Case No. FTI-167024 (Wis. Div. Hearings & Appeals July 27, 2015) (DHS).

At the hearing, the Petitioner also indicated that public records concerning his daughter's eviction should be reviewed. These have been cited using the Wisconsin Circuit Court Access website.

The issues for determination are:

1) Whether Petitioner's appeal of an underlying overpayment claim is timely;
2) If so, whether the Office of Inspector General (OIG) correctly determined the Petitioner is liable for an overpayment of benefits to his adult daughter, AM.
3) Whether the Petitioner's appeal of a tax intercept is timely, and
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There appeared at that time and place the following persons:

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[redacted]

Respondent:

Department of Health Services
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Madison, Wisconsin 53703
By: [redacted]
Public Assistance Collection Unit
PO Box 8938
Madison, WI 53708-8938

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.
2. In 1993, Petitioner signed a lease for a home located at [redacted] Also listed on the lease was his daughter AM, who was a minor at the time. (Exhibit 27)
3. The record reflects that Petitioner and his wife, RC, separated in 2003 due to Petitioner's infidelity. Petitioner moved away from the [redacted] address. He initially lived with his various mistresses but eventually moved in with his mother at an address on [redacted] (Testimony of Petitioner; Testimony of RC; Exhibit 29)
4. Petitioner and RC reconciled and Petitioner returned to the [redacted] address in August 2014. However, during all times relevant, Petitioner used the [redacted] address as his mailing address. (Testimony of Petitioner; Testimony of RC)

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A food unit consists of, "one or more persons who live in the same household and purchase and prepare food together for home consumption. This group is tested for eligibility together…" *FSH §3.3.1.1* (Federal Regulations use and define the term "household" in 7 CFR §273.1(a) with the same meaning given to the term "food unit" in the FSH).

According to OIG, Petitioner, his 33 year-old daughter, AM, and his minor child, DC, all lived together at the [redacted]address. AM applied for FoodShare benefits and reported DC, as part of her food unit/household. Petitioner is DC's father, so OIG contends that per *FSH §3.3.1.3*, the Petitioner should have been included in the food unit / household. Therefore, OIG contends that the Petitioner is liable for the FoodShare overpayment incurred by AM, pursuant to *FSH §7.3.1.2.*

Is Petitioner Precluded from Litigating the Timeliness of his Appeal, Based upon the Decision issued in case FTI-167024?

The right to appeal an underlying overpayment is a separate right, from the right to appeal the implementation of a tax intercept.

The right to appeal an underlying overpayment claim is based upon Federal Regulations. Pursuant to 7 C.F.R. §273.18(e)(3)(iii), a party has 90-days from the date of notice to appeal the underlying overpayment claim.

The right to appeal an agency decision to intercept state taxes is based in Wisconsin State statutes. Pursuant to Wis. Stats. §49.85(3)(a)2, a party has 30-days from the date of the letter/notice of tax intercept to file an appeal.

> To use tax intercept, the person must have received three or more dunning notices and the debt must be:
>
> 1. Valid and legally enforceable.
> 2. State: All error types.
>   Federal: All error types.
> 3. State: At least $20.
>   Federal: At least $25.
> 4. State: At least 30 days from notification of overissuance.
>   Federal: Not more than 10 years past due from notification date except in fraud cases. There is no delinquency period for fraud.
> 5. Free from any current appeals.
> 6. Incurred by someone who has not filed bankruptcy, nor has their spouse.
>
> *FoodShare Wisconsin Handbook §7.3.2.10*

In addition to the above criteria, a party must be given adequate notice of the underlying overpayment, before a tax intercept may be utilized. *See* 7 C.F.R. §273.18(e)(3)(iii)

The ALJ in case FTI-167024 dismissed RC's appeal of the tax intercept as untimely and therefore, declined to make any determinations regarding whether any of the above criteria were met, including the adequacy of the overpayment notice that was issued to RC.

In the case at hand, for purposes of judicial economy, I will examine the issue of whether the Petitioner's appeal of the underlying overpayment was timely, because the Petitioner stated his desire to appeal that issue. Indeed, it makes little sense to spend the administrative time and cost of having to open a separate appeal of the overpayment and schedule a separate, subsequent hearing in the matter.

The Petitioner argues that his appeal of the underlying overpayment should be considered timely because he was not given adequate notice of the overpayment.

OIG contends that Petitioner is precluded from further litigating the issue of the timeliness of his appeal of the underlying overpayment, because RC's appeal in case FTI- 167024 was deemed to be untimely.

"The party seeking to use issue preclusion bears the burden of demonstrating that the doctrine should be applied." *Masko v. City of Madison*, 265 Wis.2d 442, at 448, 665 N.W.2d 391 at 396, 2003 WI App 124 ¶4, citing *State ex rel. Flowers v. H&SS Dept.,* 81 Wis.2d 376, 389, 260 N.W.2d 727 (1978). See also *Aldrich v. Labor & Indust. Review Comm'n, 341 Wis. 2d 36 at 69, 814 N.W.2d 433 at 449, 2012 WI 43 at ¶88.* Consequently, OIG bears the burden to show that the doctrine of issue preclusion may be applied here.

There is a two-step process in determining whether the doctrine of issue preclusion forecloses a litigant from pursuing an issue that was litigated in a previous proceeding. *Aldrich v. Labor & Indust. Review Comm'n, 2012 WI 43 at ¶89;* 2003 WI App 124 ¶¶ 5 and 6.

In a case where issue preclusion is sought against a litigant who was not a party to the prior proceeding, the first step is determining whether a litigant is in privity or has sufficient identity of interest with the party to the prior proceeding, such that the issue or fact was actually litigated in the previous action. *Paige J.B. v. Steven G.B.,* 226 Wis. 2d 210 at 224, 594 N.W.2d 370 at 377 (1999); see also *Aldrich v. Labor & Indust. Review Comm'n,* 2012 WI 43 at ¶97, and *Masko v. City of Madison*, 265 Wis.2d 442, at 448, 665 N.W.2d 391 at 396, 2003 WI App 124 ¶¶ 4 and 5.

> ...Due process requires that the litigant had sufficient opportunity to be heard. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n. 7, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). In other words, due process requires that the litigant have "at least one full and fair opportunity to litigate an issue before being bound by a prior determination of that issue." Parker v. Williams, 862 F.2d 1471, 1474 (11th Cir.1989). *See also* *****378*** Kunzelman v. Thompson, 799 F.2d 1172, 1174 (7th Cir.1986). It is fundamental that nonparties cannot be bound by a prior litigation unless their interests are deemed to have been litigated. Mayonia M.M., 202 Wis.2d at 468, 551 N.W.2d 31. Anything less is a violation of the litigant's due process rights.
>
> "To be in privity the parties must be 'so closely aligned that they represent the same legal interest.' " Kunzelman, 799 F.2d at 1178 (quoting Donovan v. Estate of Fitzsimmons, 778 F.2d 298, 315 (7 th Cir.1985)). A litigant has a sufficient identity of interest with a party to a prior proceeding if the litigant's interests in the prior case can be deemed to have been litigated. Teacher Retirement System of Texas v. Badger XVI, 205 Wis.2d 532, 550, 556 N.W.2d 415 (Ct.App.1996) (quoting Mayonia M.M., 202 Wis.2d at 469, 551 N.W.2d 31). " '[O]ne ****227*** who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own ...' " has had an opportunity to litigate his or her interests and " 'is as much bound ... as he would be if he had been a party to the record.' " Montana, 440 U.S. at 154, 99 S.Ct. 970 (quoting Souffront v. La Compagnie des Sucreries, 217 U.S. 475, 486-87, 30 S.Ct. 608, 54 L.Ed. 846 (1910)).
>
> *Paige K.B. ex rel. Peterson v. Steven G.B.,* 226 Wis. 2d 210 at 226-227, 594 N.W.2d 370 at 377-378 (Wis. 1999).

"If as a matter of law, the litigant against whom issue preclusion is being asserted is not in privity or does not have sufficient identity of interest with a party to the prior proceeding, applying issue preclusion to the litigant would violate his or her due process rights and the analysis ends. Issue preclusion cannot be invoked. If, however, the litigant is in privity or has sufficient identity of

interest with a party to the prior proceeding, the court should turn to the second step." *Paige J.B. v. Steven G.B.,* 226 Wis. 2d 210 at 224-225, 594 N.W.2d 370 at 377 (1999)

The second step addresses whether applying issue preclusion is consistent with principals of fundamental fairness. *Masko v. City of Madison,* 2003 WI App 124 at ¶ 6; *Paige J.B. v. Steven G.B.,* 226 Wis. 2d 210 at 225, 594 N.W.2d 370 at 376 (1999); *Aldrich v. Labor & Indust. Review Comm'n,* 2012 WI 43 at ¶110.

The relevant factors for the court to consider in determining whether issue preclusion is fundamentally fair are as follows:

> (1) Could the party against whom preclusion is sought, as matter of law, have obtained review of the judgment;
> (2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
> (3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;
> (4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or
> (5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?
>
> *Masko v. City of Madison*, 2003 WI App 124 at ¶6, citing *Michelle T. v. Crozier,* 173 Wis.2d 681, 495 N.W.2d 327 (1993), See also *Aldrich v Labor and Industry Review Com'n*, 2012 WI 53 at ¶110

"No single factor is dispositive in the fundamental fairness analysis, and the final decision must rest on a 'sense of justice and equity'." *Aldrich v Labor and Industry Review Com'n*, 2012 WI 53 at ¶111 These five traditional factors from Wisconsin case law are not exhaustive or exclusive. Id.

Here, the evidence does not support a finding that the Petitioner is in privity with RC or otherwise had sufficient identity of interest with RC, such that his interests could be considered fully litigated at the hearing for case FTI-167024.

First, as discussed, above, the decision in RC's case, FTI-167024, was limited by the determination that her appeal of the tax intercept was untimely. There was no clear determination that her appeal of the underlying overpayment was untimely. As such, there is no clear identity of issue.

Second, the Petitioner received a notice, separate from RC's, and he filed his own appeal, separate from RC's, on a different date. (See Exhibits 1 and 22) Third, the record reflects that at the time the notices were issued, the parties were estranged and living separately, though the Petitioner was still receiving mail at RC's address.

Fourth, in case FTI-167024, the issue that the parties litigated was whether OIG correctly sought to intercept RC's tax refund to collect a FoodShare overpayment. (Exhibit 35) The issue as stated in the decision did not include OIG's action against the Petitioner. The administrative law judge in case FTI-167024 determined that RC's appeal of the tax intercept was untimely and as such, OIG was allowed to use a tax intercept to recover the overpayment. (Id.) In case FTI-167024, there was no

determination of whether RC's appeal of the underlying overpayment was untimely and there was no determination that the Petitioner's appeal of the underlying overpayment was untimely.

Fifth, the Petitioner was not listed as a party in interest in case FTI-167024. There is no indication in that decision and no assertion by OIG that the Petitioner was otherwise present or participating in the hearing for case FTI-167024. There is no claim or evidence that Petitioner gave his wife permission to represent his interests or that she was, in any way, representing his interests in case FTI-167024. Indeed, it is not likely that RC had permission to represent the Petitioner's interests in case FTI-167024, since he filed an appeal separately from RC and had his own scheduled hearing date. Consequently, there is no basis upon which to conclude the Petitioner had a prior opportunity to be heard and did, in fact, litigate his interests in case FTI-167024. As such, pursuant to the criteria set forth in *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210 at 226-227, 594 N.W.2d 370 at 377-378 (Wis. 1999), it is found that the interests of Petitioner and RC were not in privity when case FTI-167024 was heard and decided.

Because the parties were not in privity, issue preclusion may not be applied in this instance and we need not engage in the second step of the analysis. Due process requires that Petitioner's claim that he timely appealed the underlying overpayment must be examined on its own merits, based upon the record created in this case.

Is Petitioner's Appeal of the Overpayment Untimely?

OIG did not send the Petitioner an overpayment notice that was specifically addressed to him. Instead, OIG sent the Petitioner a one paragraph letter, without a salutation, closing or greeting, that stated only the following:

> [AM] did not report accurate household members living in the home during this time. Because [DC] was listed on the case and because other members of the home are recorded using [AM]'s Quest card, these individuals, including [RC] and [Petitioner], are required to be on the case. This means that their income would have been counted for the determination of Foodstamps (sic). Adding their income would have put the group over the income limit for Foodstamps (sic) for the period of 3/33/12 through 12/31/13. [AM], [RC], [VC] are all liable parties to the Foodstamp (sic) overpayment for the months of February 2012 through December 2013.
>
> (Exhibit 14)

The letter made no mention of any attachments, but a January 22, 2014 case comment indicates the OIG worker attached to the letter, copies of the overpayment notices that it sent to AM. (See Exhibit 13)

The FoodShare Wisconsin Handbook (FSH) §7.3.1.8 states that when the agency determines that an overpayment of benefits has occurred: "A Notice of FS Overissuance (F-16028) a completed FS Overissuance Worksheet (F-16030) and a FS Repayment Agreement (F-16029) must be sent to the client for all types of claims."

Form F-16030 advises the individual of the amount of the claim, the basis for the claim, and his or her rights and responsibilities, including his or her right to appeal the overpayment. *See the link in FSH§7.3.1.8*

OIG did not send the Petitioner a Form F-16030 or an equivalent notice to the Petitioner, as required by its own policies, and as such, did not provide Petitioner adequate notice of the overpayment and his right to appeal the overpayment. It is not clear why this was not done, since the form is simple enough to print off from the on-line FoodShare manual.

7 C.F.R. §273.18(e)(3) states the following:

> (3) *Notification of claim.* (i) Each State agency must develop and mail or otherwise deliver to the household written notification to begin collection action on any claim.
>
> (ii) The claim will be considered established for tracking purposes as of the date of the initial demand letter or written notification.
>
> (iii) If the claim or the amount of the claim was not established at a fair hearing, the State agency must provide the household with a one-time notice of adverse action. The notice of adverse action may either be sent separately or as part of the demand letter.

(IV) THE INITIAL DEMAND LETTER OR NOTICE OF ADVERSE ACTION MUST INCLUDE LANGUAGE STATING:
(A) The amount of the claim.
(B) The intent to collect from all adults in the household when the overpayment occurred.
(C) The type (IPV, IHE, AE or similar language) and reason for the claim.
(D) The time period associated with the claim.
(E) How the claim was calculated.
(F) The phone number to call for more information about the claim.
(G) That, if the claim is not paid, it will be sent to other collection agencies, who will use various collection methods to collect the claim.
(H) The opportunity to inspect and copy records related to the claim.
(I) Unless the amount of the claim was established at a fair hearing, the opportunity for a fair hearing on the decision related to the claim. The household will have 90 days to request a fair hearing.
(J) That, if not paid, the claim will be referred to the Federal government for federal collection action.
(K) That the household can make a written agreement to repay the amount of the claim prior to it being referred for Federal collection action.
(L) That, if the claim becomes delinquent, the household may be subject to additional processing charges.
(M) That the State agency may reduce any part of the claim if the agency believes that the household is not able to repay the claim.
(N) A due date or time frame to either repay or make arrangements to repay the claim, unless the State agency is to impose allotment reduction.
(O) If allotment reduction is to be imposed, a due date or time frame to either repay or make arrangements to repay the claim in the event that the household stops

	receiving benefits.
	(P) If allotment reduction is to be imposed, the percentage to be used and the effective date.

The one paragraph free form letter that was sent to the Petitioner met only two of these 16 requirements; it expressed an intent to recover an overpayment from the entire household and it provided the worker's phone number, though no explicit statement to call that number with any questions. No other information was provided in the free form letter.

OIG argues that it gave the Petitioner sufficient / constructive notice of the overpayment and the right to appeal the overpayment, because it attached to the free form letter the notices addressed to AM. However, the letter sent by OIG did not tell the Petitioner he had the right to contest the overpayment; it did not refer him to AM's overpayment notices for instructions on how to file an appeal, nor did it refer him to AM's notices for details about how the overpayment occurred and how it was calculated. Further, neither the repayment agreement, nor the dunning notices, nor the tax intercept notice advise the Petitioner of the right to appeal the underlying overpayment, nor how to file an appeal of the underlying overpayment. Nor do they contain the full panoply of information that the federal regulations require be put into the overpayment notice. So, while the Petitioner might have had "constructive notice" that an overpayment existed; there is no basis upon which to believe he had constructive notice of his right to appeal the overpayment.

I note that this determination is consistent with holdings in Kocher v. Department of Health and Social Services, 152Wis.2d 170, 448 N.W.2d 8 (Ct. App. 1989) and Bidstrup v. Wis. Dept. of Health and Family Services, 247 Wis. 2d 27, 632 N.W.2d 866, 2001 WI App 171.

In Kocher v. Department of Health and Social Services, 152Wis.2d 170 at 172, 448 N.W.2d 8 (Ct. App. 1989) the court did not review the issue of whether the notice in question adequately advised the Petitioner of his appeal rights, because the Petitioner's attorney filed a timely appeal, regardless of the adequacy of the notice. However, the court of appeals in Kocher noted that, "that due process requires that claimants facing termination of public assistance benefits must be given timely and adequate notice detailing the reasons for a proposed termination, and providing an effective opportunity to defend, because such notice is especially important to protect claimants against proposed agency action resting on incorrect or misleading factual premises, or on misapplication of rules or policies to the facts of particular cases." Id.

The court of appeals in Bidstrup v. Wis. Dept. of Health and Family Services, 247 Wis. 2d 27, 632 N.W.2d 866, 2001 WI App 171 at ¶3, found that notices issued by DHS that effectively terminated health care benefits were inadequate to satisfy the requirements of due process, because they did not provide information regarding the recipient's right to appeal, as required by DHS's own rules. The court of appeals further sates, "When a government agency does not comply with its own procedural requirements, we are loath to deny all recourse to the affected parties." Bidstrup v. Wis. Dept. of Health and Family Services, 247 Wis. 2d 27, 632 N.W.2d 866, 2001 WI App 171 at ¶17 Thus, the running of an appeal period from an agency decision should be tolled where an affected party receives no notice of appeal rights. Bidstrup v. Wis. Dept. of Health and Family Services, 247 Wis. 2d 27, 632 N.W.2d 866, 2001 WI App 171 at ¶18.

Based upon all of the foregoing, it is found that OIG failed to give the Petitioner adequate notice of the overpayment and his right to contest the overpayment. Accordingly, it is found that the Petitioner's appeal of the overpayment is timely.

Is Petitioner Precluded From Litigating the Issue of Whether AM, DC and He Were Living Together in, Because of the Decision Issued in case FOF-162609?

As discussed earlier, OIG asserts that Petitioner is liable for the overpayment incurred by AM, because AM included Petitioner's son, DC, in her food unit / household and because it believes Petitioner, AM and DC all lived together at [redacted] between February 2012 and October 2013.

Petitioner asserts that neither he, nor AM were living at [redacted], at the time in question.

OIG again argues that the Petitioner is precluded from litigating the issue of whether he and AM were residing together, because that issue was already litigated in AM's Administrative Disqualification Hearing for case FOF-162609 and the administrative law judge made a finding of fact that Petitioner and AM were living together, but AM failed to report this living arrangement. (See Exhibit 30)

The record does not support a finding that Petitioner and AM were in privity or otherwise had sufficient identity of interest such that Petitioner's interests could be considered litigated at the hearing for case FTI-167024.

There is no indication in the decision issued in case FOF-162609 and there is no assertion by OIG that the Petitioner was otherwise present or participating in the hearing for case FOF-162609. There is no claim and no evidence that the Petitioner had the opportunity to examine OIG's evidence or cross-examine its witness in case FOF-162609. Further, there is no claim or evidence that AM was representing Petitioner's interests in case FOF-162609. On the contrary, the decision issued in case FOF-162609 indicated that AM did not even appear to represent her own interests at her hearing. Consequently, no one was present at the hearing to litigate the matter in opposition to OIG.

Based upon the foregoing, there is no basis upon which to conclude the Petitioner and AM were in privity, such that the Petitioner was able to litigate his interests in case FOF-162609. Consequently, issue preclusion may not be applied and due process requires that Petitioner's claim that he was not living with AM be examined on its own merits, based upon the record created in this case.

I note for the record, that there is no evidence that any one, at any time, has litigated the validity of the underlying overpayment incurred by AM.

Did an Overpayment of Benefits Occur, for which Petitioner is Liable?

As discussed above, OIG asserts that Petitioner is liable for the overpayment incurred by AM, because it believes both AM and Petitioner were living at [redacted] between February 2012 and October 2013; Petitioner testified that neither AM nor he were living at the [redacted] address.

Petitioner produced a lease for the [redacted] address, from 1993, that included AM in the list of individuals who would reside there. However, in 1993, AM was 14 years-old. So, she would have been included in her father's lease in 1993.

In 2012, when AM filled out the first FoodShare application in question, she was 33 years-old. It is not inconceivable, that she would have been living elsewhere at the time, as Petitioner claims.

Petitioner and RC testified that AM was living at [redacted] during the time in question, and that she was recently evicted from the property. The Petitioner testified that circuit court records reflect the eviction, stating something to the effect of, "you can look it up". A check of circuit court records shows that AM was evicted from the [redacted] address in October 2014 and that the circuit court had the [redacted] address listed for AM in cases dating back to March 29, 2012. (See cases 2010 SC36118, 2012 CV003711, 2012TJ000892 and 2014SC0273347 at http://wcca.wicourts.gov/index.xsl)

In order to prove AM was living at [redacted] during the time in question, the agency relied upon the applications and six month report form that AM completed, listing [redacted] as her address. (Exhibits 31, 32, 33 and 34) According to the testimony of OIG's representative, OIG did not seek and obtain any verification that AM was actually living at [redacted] because it did not deem her residence questionable. However, there is, in fact, some question as to whether AM was actually living at the address or using it as a mailing address, since she also listed herself as homeless in two of her applications.

Further, little credibility can be given to AM's hearsay statements in any of those documents, since she has been disqualified from the FoodShare program for lying, even under penalty of perjury, about other matters in those forms, such as her rent expense and whether another relative, NP, was actually living with her. (See Exhibits 30-34) I also note that the case comments submitted by OIG indicate that it believes AM fabricated evidence to falsely verify the children's school enrollment. (See Exhibit 3)

It should be noted that the Supreme Court of Wisconsin in *Gehin v. Wisconsin Group Insurance Board,* 278 Wis. 2d 111, 692 N.W.2d 572, 2005 WI 16, held that a finding of fact cannot be based solely upon uncorroborated hearsay evidence, when controverted by credible, in person, testimony. The Supreme Court stated that the relaxed evidentiary standards in administrative proceedings was, "not meant to allow the proceedings to degenerate to the point where an administrative agency relies only on unreliable evidence." *Gehin,* 278 Wis. 2d 111, ¶51, 692 N.W.2d 572. The Gehin court referenced prior decisions in *Consolidated Edison Co. v. NLRB,* 205 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938) and *Village of Menomonee Falls v.DNR*, 140 Wis. 2d 579, 412 N.W.2d 505 (1987) in stating that mere uncorroborated hearsay or rumor does not constitute substantial evidence and that administrative bodies should never ground administrative findings upon uncorroborated hearsay. *See also Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), cited by the dissent in *Gehin Supra*, in which the U.S. Supreme Court allowed a finding of fact to be made based upon hearsay when there were nine factors that supported the reliability of the hearsay. See Also *Michelle V. Housing Authority of the City of Milwaukee, 779 N.W.2d 185, 2010 WI App 14*

In the absence of any credible evidence, OIG has not met its burden to prove AM was living at the [redacted] address. Because OIG did not seek out verification of AM's residence and because it has not produced any reliable evidence to prove where AM was living, it cannot prove that the Petitioner and AM were living together. Accordingly, it is found, based upon the record in this case, that OIG has not met its burden to prove that the Petitioner is liable for any overpayment incurred by AM.

Is Petitioner's Appeal of the Tax Intercept Untimely?

Wis. Stat., §49.85, provides that the department shall, at least annually, certify to the Department of Revenue, the amounts that it has determined that it may recover resulting from an overpayment of

general relief benefits, overissuance of FoodShare benefits, overpayment of AFDC, and Medical Assistance payments made incorrectly.

The Department of Health Services must notify the person that it intends to certify the overpayment to the Department of Revenue for setoff from his/her state income tax refund and must inform the person that he/she may appeal the decision by requesting a hearing. Id. at §49.85(3).

The hearing right is described in Wis. Stat., §49.85(4)(b), as follows:

> If a person has requested a hearing under this subsection, the department … shall hold a contested case hearing under s. 227.44, except that the department … may limit the scope of the hearing to exclude issues that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing.

A party has 30-days from the date of the letter/notice of tax intercept to file an appeal. Wis. Stat., §49.85(3)(a)2; FSH §7.3.2.11

The Public Assistance Collections Unit (PACU) sent the June 13, 2014 notice of tax intercept to the Petitioner at the [redacted] address. The Petitioner claims that he never received the notice, because he stopped living at the [redacted] address, after he and RC informally separated. However, the Petitioner testified that even though he and RC had become estranged and he stopped living at the [redacted] address, that he continued to use the [redacted] address as his mailing address.

Wis. Stats. §891.46 creates a presumption that service has occurred upon mailing, stating that, "summonses, citations, notices, motions and other papers required or authorized to be served by mail in judicial or administrative proceedings are presumed to be served when deposited in the U.S. mail with properly affixed evidence of prepaid postage." Further, "the mailing of a letter creates a presumption that the letter was delivered and received." State ex. rel Flores, 183 Wis.2d 587 at 612, 516 N.w.2d 362 (1994) Thus, the party challenging the presumption bears the burden of presenting credible evidence of non-receipt. Id at 613.

Given that PACU sent the tax intercept notice to the Petitioner at his correct mailing address, it is reasonable to conclude that Petitioner received the notice. There is no credible reason presented, why Petitioner would not have received the notice. Indeed, both Petitioner and RC testified that they were on good terms at the time and in fact, moved back in together in August 2014.

Petitioner did not file his appeal of the tax intercept until June 16, 2015, well past the 30-day deadline for filing an appeal of the tax intercept. As such, his appeal of the tax intercept is untimely and no jurisdiction exists to hear the merits of that appeal.

CONCLUSIONS OF LAW

1. Petitioner's appeal of the underlying overpayment is timely.
2. OIG did not meet its burden to prove that it correctly determined that the Petitioner is liable for an overpayment incurred by AM.
3. Petitioner's appeal of the tax intercept is untimely.
4. Because that appeal is untimely, Hearings and Appeals does not have jurisdiction to review the merits of Petitioner's appeal of the tax intercept.

THEREFORE, it is **ORDERED**

That, if this decision is adopted by the Secretary of the Department of Health Services, OIG remove the Petitioner as liable party from:

Claim [redacted] for $680.00, for the period of February 22, 2012 to July 31, 2012,

Claim [redacted] for $2303.00 for the period of August 1, 2012 through January 31, 2013.

Claim [redacted] for $1968.00 for the period of February 1, 2013 through July 31, 2013.

Claim [redacted] for $1054.00 for the period of August 1, 2013 through October 31, 2013.

Claim [redacted] for $155.00 for the period of December 2, 2013 through December 31, 2013.

DHS shall refund the $678.00 that was recovered from the Petitioner.

OIG shall take all administrative steps necessary to complete these tasks within ten days of the Secretary's decision.

In all other respects, the appeal is dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Interim Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final interim decision-making. The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee, Wisconsin, this 8th day of September, 2015.

Mayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals